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In the Supreme Court of the United States

OCTOBER TERM, 1966
No. 462 and 463

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, STEWART L. UDALL, SECRETARY OF THE INTERIOR,
Petitioners,

vs.

FEDERAL POWER COMMISSION,
Respondent.

STATE OF OREGON, ACTING BY AND THROUGH JONEL C. HILL, PUBLIC UTILITY COMMISSIONER OF OREGON, THE STATE WATER RESOURCES BOARD, THE OREGON STATE GAME COMMISSION AND THE FISH COMMISSION OF OREGON,
Intervenors.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT INTERVENOR IN OPPOSITION

Respondent Intervenor prays that the Petitions of Washington Public Power Supply System and the Secretary of the Interior for respective Writs of Certiorari be denied for the reason that the questions decided by the lower court have been settled by this Court.

INTRODUCTION

The official position of the State of Oregon is set forth in the May 5, 1960 order of the Oregon Water Resources Board.

Pursuant to this order the Hydroelectric Commission of Oregon issued a license to Pacific Northwest Power Company to construct Project No. 194 which is identical to Federal Power Project No. 2243 (High Mountain Sheep). This license provides special conditions regulating the construction, operation and maintenance of the project. The Federal Power Commission license also provides such conditions. Full coordination of the project with both federal and non-federal projects with full provision for preservation of fishlife, recreation and flood control are thus guaranteed.

The Water Resources Board is to encourage, promote and secure a maximum beneficial use and control of water resources in Oregon.[1] The Board is to give proper and adequate consideration to the multiple aspects of the beneficial use and control of such water resources which are to be designed to best protect and promote the public welfare generally.[2]

The State of Oregon is in agreement with the Federal Power Commission that Project No. 2243 is the best use of the river resources and that the power to be derived therefrom is needed now.

REASONS FOR DENYING WRIT ON PETITION OF WASHINGTON PUBLIC POWER SUPPLY SYSTEM

THE LOWER COURT FOLLOWED THE WELL ESTABLISHED RULE OF ADMINISTRATIVE LAW THAT A COURT'S FUNCTION IS LIMITED TO DECIDING WHETHER THE ADMINISTRATIVE INTERPRETATION HAS WARRANT IN THE RECORD AND A REASONABLE BASIS IN LAW.

[1] ORS 536.430
[2] ORS 536.220 (2)

The scope of judicial review of the Federal Power Commission decision is limited by the Federal Power Act:

> "The finding of the Commission as to facts, if supported by substantial evidence, shall be conclusive."[1]

On questions of law relating to the interpretation of statutes:

> "Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute. Norwegian Nitrogen Products Co. v. United States, 288 US 294, 77 L ed 796, 53 S Ct 350; United States v. American Trucking Assos. 310 US 534, 84 L ed 1345, 60 S Ct 1059. But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. Like the commission's determination under the Longshoremen's & Harbor Workers' Act, that a man is not a 'member of a crew' (South Chicago Coal & Dock Co. v. Bassett, 309 US 251, 84 Led 732, 60 S Ct 544) or that he was injured 'in the course of employment' (Parker v. Motor Boat Sales, 314 US 244, 86 L ed 184, 62 S Ct 221) and the Federal Communications Commission's determination that one company is under the 'control of another' (Rochester Teleph. Corp. v. United States, 307 US 125, 83 L ed 1147, 59 S Ct 754), the Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record and a reasonable basis in law.' "[2]

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[1] 16 USCA § 825 l (b)

[2] *National Labor Relations Board vs. Hearst Publications*, 322 US 111, 88 L ed 1170, 1184 (1943)

This Court again applied this principle in the *Aragon* case[8] where it is stated:

> "To sustain the Commissioner's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings. 'The reviewing court's function is limited.' *All that is needed to support the Commissioner's interpretation is that it has 'warrant in the record and a 'reasonable basis in law.'* "[9] (emphasis supplied)

Since the Court of Appeals applied the well settled administrative law doctrine of *Hearst Publications* and *Aragon*, we submit there is no reason for this Court to review the matter.

I

THE PUBLIC AGENCY PREFERENCE UNDER SECTION 7 OF THE ACT WAS NOT REJECTED BY THE LOWER COURT, BUT THE COURT MERELY APPLIED THE EXCEPTION THAT WHERE A PRELIMINARY PERMIT HAS BEEN ISSUED UNDER SECTION 5, THE PERMITTEE HAS SUCH PRIORITY AS DEFINED BY THE FEDERAL POWER COMMISSION

1. The lower court decision is not a "bench mark decision" but merely followed the well settled administrative rule supporting administrative interpretation of statute where it has "warrant in the record" and a "reasonable basis in law."

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[8] *Unemployment Compensation Commission of Alaska v. Aragon*, 329 US 143, 91 L ed 136 (1946)

[9] Id. 329 US at 153-154, 91 L ed at 145

The reviewing Court is bound by the administrative interpretation of a statute if it has "warrant in the record" and a "reasonable basis in law" which the court below followed.[6]

2. Contrary to Petitioner's contention, the Federal Power Commission and all parties to this action understood the term "reach."

All parties, including petitioner, entered into a stipulation at the prehearing conference defining "common reach" of the river.[6]

3. The Congressional policy of preference to public agencies is not modified by the decision but merely recognizes the exception "where a preliminary permit has been issued."

Section 7 grants a preference to public agencies only "where no preliminary permit has been issued." To describe the exact location of the "best adapted" project is an impossible task at the time of filing the application for a preliminary permit. Congress could not have demanded this and the Commission agrees. The purpose of the preliminary permit is to protect applicant while determination of the "best adapted" project is made. It is only reasonable that the preliminary permit extends to all potential projects on the same river reach which the applicant proposes to develop.

4. The Federal Power Commission retains control over the activities of permittee and the decision will not

[6] *National Labor Relations Board v. Hearst Publications*, 322 US 111, 88 L ed 1170, 1184 (1943)

[6] Petitioner's Appendix D. 29a, n.10

cause the development of an entire waterway to be put into "deep freeze."

The Commission may compel whatever requirements are necessary in order to be assured of implementing the "best adapted" project and has the right to cancel the permittee's permit if he does not comply with its requirements.

5. The Federal Power Commission determination in this case brings the necessary "flexibility" in developing a reach of river.

The Federal Power Commission regulation 4.30 provides:

> "An application for a license may be filed by any citizen, association of citizens, corporation, State, or Municipality desirous of obtaining a license pursuant to the Act: Provided, however, That if a preliminary permit has been issued, no action on application by others than the permittee covering the whole or any part of the same reach of stream or streams shall be taken that might infringe on the right of the permittee under sections 5 and 7 of the Federal Power Act."

The rule recognizes that the preliminary permittee's priority must extend beyond the precise site described in his permit so long as he remains within the same reach of stream.

II

THE COURT OF APPEALS HAS DECIDED FEDERAL QUESTIONS IN THIS CASE CONSISTENT WITH APPLICABLE DECISIONS OF THIS COURT

Section 10(a) provides that "the Commission shall have authority to require the modification of any project

and of the plans and specifications of the project works before approval" in order to secure the best adapted comprehensive plan to develop a waterway. The Commission is clearly authorized to license a project which would affect lands and waters beyond the boundaries of the original permit or license application. While it is true that the Act and regulations contemplated the segregation of public lands to be affected by a project described in the preliminary permit, this does not imply that additional or different lands will not be affected by the project which will ultimately be built. The purpose of the Act is to insure the best use of the nation's water resources.

The court below followed the well settled rules adopted in the *Hearst* case[6] that its reviewing function is limited to deciding whether the administrative interpretation has "warrant in the record" and a "reasonable basis in the law." The commission is dealing with a broad statutory term in a proceeding before that agency and rightly determines it initially. The Federal Power Commission is authorized to define the scope of the term priority afforded to the preliminary permit under section 5 of the Act. This the commission did.[6] The court below decided that the interpretation of the commission had "warrant in the record" and a "reasonable basis in law."

Any application for amendment would be a useless act since the license application accomplishes the same

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[6] *National Labor Relations Board vs. Hearst Publications*, 322 US 111, 88 L ed 1170 (1943)

[6] Commission Finding No. 10, Petitioner's Appendix P. 77a

purpose. Under regulation 4.30 a permittee would retain his priority over any project on the same river reach even though it was not described in his original permit.

REASONS FOR DENYING WRIT ON PETITION OF SECRETARY OF THE INTERIOR AND ARGUMENT IN ANSWER TO SECRETARY

The Federal Power Commission is not required to make an affirmative finding that development should *not* be by the federal government. When private construction is allowed, approval of the private application requires a determination that the proposed project is the "best adapted to a comprehensive plan" for water resources development. 16 USCA § 803 (a). See also the language of this court in the *Roanoke Rapids* case.[9] The thrust of the Secretary's Brief indicates that he wants to substitute his judgment for the Federal Power Commission's judgment, the latter agency is the expert agency charged under the Federal Power Act to make the determination in the first instance. The Federal Power Commission fully considered the contentions of the Secretary in its order.[9] The Federal Power Commission made the determination that it would be in the best interest to proceed with the construction of the dam which Pacific Northwest Power Company is able and willing to do. In contrast, there are the uncertainties of federal construction. The Secretary must first receive approval of the construction by Congress and more im-

[9] *United States ex rel Chapman vs. Federal Power Commission*, 345 US 153, 168, 97 L ed 918, 931 (1952)

[9] Petitioner, Washington Public Power Supply System Appendix P. 73a-74a

portant, funds must be appropriated. There is no basis or reason to assume that Pacific Northwest Power Company will not carry out all functions and requirements of the permit even though not related to power production.

We submit that the best interest of the public is for the immediate construction of the High Mountain Sheep Dam and that the court below adopted the proper administrative law tests in reviewing the judgment of the Commission.

CONCLUSION

The petitions for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Oregon Brief of Respondent-Intervenor in Opposition upon the petitioner and the named respondent by causing copies thereof to be mailed, airmail postage prepaid, to:

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Copies of the foregoing Brief also have been mailed, airmail postage prepaid, to counsel for the other intervenors in the Court below, as follows:

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